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NO. 84-1784

In The
Supreme Court of the United States
October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

SUPPLEMENT TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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Respondents respectfully supplement their Opposition to Petition for Writ of Certiorari (the "Opposition"), in light of this Court's recent decision in *Phillips Petroleum Co. v. Shutts,* — U.S. —, 105 S.Ct. 2965 (1985) and arguments raised in connection therewith in Petitioners' Reply to Opposition to Petition for Writ of Certiorari (the "Reply").

I.

NON-RESIDENT CLASS MEMBERS WERE PROPERLY AFFORDED DUE PROCESS PROTECTION AS MANDATED IN PHILLIPS PETROLEUM

In *Phillips Petroleum Co. v. Shutts,* — U.S. —, 105 S.Ct. 2965, 2975, this Court set forth certain minimum standards of due process protection that must be afforded absent class plaintiffs by a state which seeks to adjudicate their claims. "The plaintiff must receive notice[,] . . . an opportunity to be heard and participate in the litigation, . . . [and] an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. Finally, the Due Process Clause . . . requires that the named plaintiff at all times represent the interests of the absent class members." (*Ibid,* citing *Hansberry v. Lee,* 311 U.S. 32, 42-43)

Even if, *arguendo,* Grynbergs are not held to have waived their due process objections by failing to have timely raised said objections before the trial court, absent class members were afforded ample due process protection under the standards set forth in *Phillips Petroleum.* Notice in the form approved by the court was mailed to all members of the class[1]; each member of the class was expressly notified of the right to opt out; no member of

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[1] Grynbergs raised no objection to the form of notice.

the class elected to opt out; and each member of the class filed verified answers to interrogatories prior to trial. There is thus absolutely no basis suggested by *Phillips Petroleum* or any other authority upon which Grynbergs can complain that absent class members' interests were not adequately protected or represented by named plaintiffs.

In its rejection in *Phillips Petroleum* of petitioner's contention that the Due Process Clause requires that absent class plaintiffs affirmatively "opt in" to the class, rather than be deemed members of the class if they do not "opt out," this Court expressly noted that "[a]ny plaintiff may consent to jurisdiction. . . . The essential question, then, is how stringent the requirement for a showing of consent will be." (*Id.*, at pp. 2975-2976) This court went on to hold that the "opt out" procedure followed by Kansas was sufficient to satisfy due process and that "[r]equiring a plaintiff to affirmatively request inclusion" was unnecessary. (*Id.*, at p. 2976) Surely then, Grynbergs' argument to the contrary notwithstanding, individually verified responses to interrogatories by *every class member* is a sufficient act of consent by each class member, and establishes that each class member received adequate notice of the pendency of the action.[2]

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[2] It is ironic that Grynbergs quote language from this Court's opinion in *Phillips Petroleum* to distinguish cases cited by Respondents for the proposition that certain actions may be deemed to constitute a general appearance under California law. (Reply, p. 6, fn. 6) The basis upon which this Court held in *Philips Petroleum* that standards governing state-court jurisdiction over a defendant do not equally apply to a state's assertion of jurisdiction over absent plaintiffs is that,

> "[t]he burdens placed by a state upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." (*Id.*, at p. 2973)

(Continued on following page)

Grynbergs contend that by virtue of an amendment to the original complaint by which the plaintiff class added causes of action seeking only alternative forms of relief, absent class members' due process rights were violated. (Reply, pp. 2-3) Notably, however, Grynbergs fail to cite any authority for this novel proposition. *Phillips Petroleum* does not suggest that due process requires new notice to be sent each time representative plaintiffs determine to seek additional or alternative remedies based on the same underlying facts. Furthermore, Grynbergs fail to disclose that in permitting the amendment to plaintiffs' complaint, the law and motion judge necessarily determined that it presented no new factual or legal issues, and that the trial court expressly so found in denying Grynbergs' motion for an additional continuance of the trial date. (R.T. p. 9)[3] The California Court of Appeal also found, contrary to Grynbergs' argument, that the amendment to the complaint did *not* substantially or materially alter the nature of the original proceedings.[4]

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Logically, therefore, this Court would presumably require even less stringent standards for voluntary submission by an absent class plaintiff than by an absent defendant. Furthermore, Grynbergs fail to cite any rationale or authority for the proposition that a defendant can voluntarily submit to a court's jurisdiction by virtue of his affirmative actions before the court whereas an absent class plaintiff cannot.

[3] The Reporter's Transcript on Appeal to the California District Court of Appeal will be cited as "R.T."

[4] Petitioners blatantly cite out of context the language of the Court of Appeal for the proposition that "this case involves a 'failure to provide notice to the class of an amendment to the complaint seeking the different remedy of rescission.'" The quotation in context reads as follows:

> "Finally, we discern no prejudice to Grynberg by reason of the failure to provide notice to the class of the amend-

(Continued on following page)

Grynbergs' entire argument is thus premised on a falacious contention.

Grynbergs argue that they could not be held to have waived their due process rights because they had no legal power to waive rights personal to absent class members. (Reply, pp. 4-5) This argument, however, begs the very issue which underlies Grynbergs' position. Adequate protection of absent plaintiff class members' due process rights is essential to defendant, and it is defendant's responsibility to ensure that such protection is afforded if any judgment ultimately obtained is to have *res judicata* effect as to such absent class members. It is on that basis that this Court determined in *Phillips Petroleum* that petitioner therein had standing to raise the issue of the adequacy of absent class members' due process rights.

> "The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment *is to ascertain that the forum court has jurisdiction over every plaintiff* whose claim it seeks to adjudicate. . ."
>
> (*Phillips Petroleum Co. v. Shutts, supra,* 105 S.Ct. at p. 2972) (Emphasis supplied)

Thus, under *Phillips Petroleum* the adequate due process protection of the absent class members is deemed

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ment seeking the different *remedy* of rescission. Since plaintiff class received adequate notice of the original complaint alleging the same ultimate factual averments underlying the rescission theory of relief, separate lawsuits by individual members could not be successfully maintained. In any case, since the judgment was returned in favor of plaintiff class, none of whose members earlier chose to opt out, the error—if any—in failing to provide additional notice, was clearly harmless."

(Ap. p. 8; the Appendix to Grynbergs' Petition for Writ of Certiorari will be cited as "Ap.")

a "distinct and personal interest [of defendant]" and as such, it is defendant's responsibility to ensure that such protection is afforded if he is to obtain a judgment with binding effect. (*Ibid.*) *Phillips Petroleum* does not hold that defendant may raise those issues after judgment on the merits has been rendered against him. Whatever rights defendant may assert, be they his own or be they the rights of the class members, must be asserted before the trial court, before trial and before judgment on the merits has been rendered. Grynbergs' contention that *Phillips Petroleum* suggests that "[j]urisdiction over absent class members does not require *any* action by . . . class-action defendant" (Reply p. 5) is simply without merit.

II.

PHILLIPS PETROLEUM DOES NOT OBVIATE THE REQUIREMENT THAT PETITIONERS RAISE DUE PROCESS AND CHOICE-OF-LAW ISSUES BEFORE THE TRIAL COURT

Despite all of the hyperbole contained in Grynbergs' arguments before this Court, they have failed to adequately respond to the thrust of respondents' position, *i.e.*, Grynbergs did not timely raise either the purported due process or choice-of-law issue before the trial court. In *Phillips Petroleum*, both the jurisdictional and choice-of-law issues were fully litigated before the trial court. Both issues were timely raised and considered and therefore properly preserved on appeal.

No such action was taken by Grynbergs in the instant case. Instead, they permitted the trial court to render judgment on the merits, and only then, after an adverse judgment was rendered, did they raise the issues they now raise before this Court contending that those

newly raised issues entitle them to an entirely new trial. As a result, members of the plaintiff class were precluded from responding to or taking any action to meet either issue in the trial court. No court, at either the state or federal level, has ever condoned such strategy.[5]

If there is any unfair "one-way intervention," as Grynbergs suggest, it is to permit a defendant to raise for the first time after the determination has been made that he has lost on the merits, issues which should have been litigated before trial. If such a procedural rule were to be allowed, it would be impossible for a plaintiff class to ever obtain a binding judgment, since a defendant could proceed to trial on the merits without risk and then, if he lost, raise a battery of new issues at each appellate level.

Grynbergs' assertion that the choice-of-law issues were adequately raised before the trial court is a patent misrepresentation of fact. The only choice-of-law issue raised before the trial court was in connection with Grynbergs' original position that the trial court should apply the law of *defendants'* residence, *i.e.*, Colorado.[6] Grynbergs' belated contention that the the trial court should have ap-

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[5] Grynbergs blatantly mischaracterize respondents' reliance upon *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 114 Cal.Rptr. 97, 522 P.2d 266. (Reply p. 8, fn. 9) Respondents do not argue the correctness of California's choice-of-law standard as Grynbergs intimate; that issue is not relevant to this appeal. The only issue relevant to this Petition is that California law (consistent with federal law) requires that choice-of-law objections be raised in a timely manner before trial. This Court's rejection in *Phillips Petroleum* of a Kansas choice-of-law standard was unrelated to the procedural manner or timeliness in which the choice-of-law objection was required to be raised.

[6] It is specifically to that issue only that the findings of fact and conclusions of law cited in Grynbergs' Reply are addressed.

plied the law of the jurisdiction of each class member's residence was never raised or even mentioned prior to the trial court's announcement of its decision on the merits.

III.

IN LIGHT OF THE GUIDELINES SET FORTH IN PHILLIPS PETROLEUM, APPLICATION OF CALIFORNIA LAW IS APPROPRIATE

Even if, *arguendo,* Grynbergs are not held to have waived their choice-of-law objections by failing to have timely raised said objections before the trial court, the California courts correctly applied California law as mandated by this Court in *Phillips Petroleum.* In deciding the choice-of-law issue before it in *Phillips Petroleum,* this Court adopted the standard " 'that for a state's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' " (*Phillips Petroleum Co. v. Shutts, supra,* 105 S.Ct. at pp. 2978-2979, citing *Allstate Ins. Co. v. Hague,* 499 U.S. 302, 312-313 (1981))

In applying that standard in *Phillips Petroleum,* this Court examined first, whether the law of the forum state conflicted in any material way with any other law which could have been applied;[7] and second, whether the forum state had a "significant contact or aggregation of contacts" to the claims asserted by each member of the plaintiff class. (*Id.,* at pp. 2977-2980) Only after determin-

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[7] Which said procedure is virtually identical to that followed by California courts under *Hurtado v. Superior Court, supra,* 11 Cal.3d at p. 580.

ing that the law of the forum state was in "substantive conflict" with that of other jurisdictions whose laws could have been applied,[8] and that the percentages of plaintiff class members and subject gas leases which had any connection with the forum state were miniscule,[9] did this Court find that application of Kansas law to every claim was sufficiently arbitrary and unfair as to exceed constitutional limits. (*Id.*, at p. 2980)

In the instant case there is no substantive conflict between the law applied and that of any other jurisdiction whose law could have been applied. As noted in Respondents' Opposition, the instant action was tried below in common law fraud which does not differ significantly from jurisdiction to jurisdiction; the determinative issues of reliance, causation, materiality and intent are issues of fact, not of law. (Opposition, pp. 16-19)

This Court expressly held that "[w]e must first determine whether [the law of the forum state] conflicts in any material way with any other law which could apply. There can be no injury in applying [the law of the forum state] if it is not in conflict with that of any other jurisdiction connected to this suit." (*Phillips Petroleum Co. v. Shutts, supra,* 105 S.Ct. at p. 2977) Grynbergs do not refute respondents' position that the application of common law fraud does not vary materially throughout the United States, nor respondents' contention that the trial

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[8] Under Oklahoma law, for example, liability may not have existed at all. (*Id., at p. 2980)*

[9] Less than one percent (1%) of the gas leases at issue were located in Kansas and only three per cent (3%) of all plaintiff class members resided in Kansas. (*Id.*, at p. 2977)

court's award of punitive damages and express findings of deliberate misrepresentation would be sufficient to satisfy any state's standard of proof for common law fraud. Instead, Grynbergs engage in an irrelevant discussion of the purported uniqueness of California's securities and corporate blue sky laws. Therefore, absent any showing that a substantially different result would have been obtained in any other jurisdiction in which this action could have been tried, there is no basis on which this Court can determine that Grynbergs were caused injury by application of California law.

Furthermore, California *does* have a significant contact to the claims asserted by the plaintiff class. No other state was as involved with this action as was California. The GGRB program was registered in California; thirty-two percent (32%) of the members of the class were California residents; and defendants apparently spent more time and energy soliciting in California than in any other state. Thus, in direct contrast to the situation faced by this Court in *Phillips Petroleum*, California was the *most reasonable* forum for the trial of this action; it was, in fact, selected because of the substantial number of California residents included in the class.

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CONCLUSION

Grynbergs present no issue for consideration by this Court. *Phillips Petroleum* provides no basis upon which the judgment entered in this action can be attacked. The due process requirements of *Phillips Petroleum* were satisfied. Each class member received adequate notice, did not opt out, and actively participated in the action. The amendment to the complaint merely sought a different remedy than the original complaint based on the same

facts and legal principles. The members of the plaintiff class were and are bound by the judgment. Grynbergs cannot cure their failure to timely assert objections, if any, to the form of the notice by attempting to assert a non-existent denial of rights to the class members.

Similarly, *Phillips Petroleum* does not permit choice-of-law issues to be raised for the first time by defendant after trial on the merits and after he has been adjudged the loser. If the defendant voluntarily proceeds to trial under the law of the forum (or seeks, as did Grynbergs, adjudication under the law of a state other than that of the resident class members), he cannot be permitted to then raise that choice-of-law issue after trial. Constitutional protection of the defendant's rights does not require that he be permitted to try his case once under one rule of law (even assuming, *arguendo,* there was a real conflict of law in this case) and then, if he loses, object for the first time and retry his case under some other rule of law.

A defendant must timely assert his claims and objections. If he fails to do so, he waives them. This case is that simple.

For all the reasons stated in the Opposition and herein, Grynbergs' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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